Supreme Court, U.S.
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No. 98-1684

In The

Supreme Court of the United States

October Term, 1998

DAVID L. PAUL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred in affirming the district court's decision to add seventeen points to the defendant's sentencing calculation pursuant to Section 2F1.1 of the United States Sentencing Guidelines based on alleged losses in excess of $56 million, and in ordering restitution in a similar amount, without any finding by the district court that the losses were caused by the defendant's conduct.

2. Whether the court of appeals erred in affirming the district court's order which delegated to the probation officer the scheduling of over $56 million in restitution payments from an impecunious defendant.

PARTIES TO THE PROCEEDING

The parties to this proceeding are contained in the caption of the case. Mr. Paul is not a corporate entity. Accordingly, Rule 29.6 is not applicable to this Petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner David L. Paul respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

Neither the opinion of the district court nor the opinion of the court of appeals were reported. The Third Amended Judgment of the district court is attached as Appendix C. The unpublished per curiam opinion and judgment of the court of appeals are attached as Appendices A and B, respectively. The court of appeals order denying Petitioner's Motion for Rehearing is attached as Appendix E.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on October 2, 1998. The Eleventh Circuit Court of Appeals denied Petitioner's Motion for Rehearing on January 13, 1999. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition involves the causation standard for calculating losses under section 2F1.1 of the United States Sentencing Guidelines and for calculating restitution

under the Victim Witness and Protection Act ("VWPA"). 18 U.S.C. § 3663. This petition also addresses the issue whether a district court may delegate its restitution decision to a probation officer under the VWPA. The pertinent text of section 2F1.1 of the United States Sentencing Guidelines is set forth in Appendix F. The pertinent text of the VWPA is set forth in Appendix G.

STATEMENT OF THE CASE

1. Basis for Jurisdiction in the Court of First Instance

The jurisdiction of the District Court for the Southern District of Florida was pursuant to 18 U.S.C. § 3231. The jurisdiction of the Court of Appeals for the Eleventh Circuit was pursuant to 28 U.S.C. § 1291, FRAP Rule 4(b), and 18 U.S.C. § 3742(a).

2. Relevant Factual Background

Petitioner, David L. Paul, was the Chairman and Chief Executive Officer of CenTrust Bank (formerly Dade Savings & Loan Association) in Miami, Florida. In 1988, CenTrust issued $150 million of subordinated debentures to Drexel, Burnham, Lambert and Merrill Lynch, who in turn sold them to institutional investors. The government alleged that David L. Paul entered into an agreement with Ghaith Pharaon,[1] whereby Pharaon would purchase $25 million of the debentures in return for Paul's agreement to repurchase the debentures at the same price a

[1] Mr. Pharaon was affiliated with BCCI.

short time later. Such an arrangement is known as a "parking" scheme and violates federal securities laws.

The debentures were issued to Drexel and Merrill Lynch in May, 1988. They were then sold on the open market by Drexel and Merrill Lynch. A CenTrust subsidiary subsequently repurchased $25 million of the debentures from Pharaon. Mr. Paul claimed that the debentures were repurchased from Pharaon for legitimate reasons (not relevant here). For reasons totally unrelated to this alleged parking scheme, the value of the CenTrust debentures decreased in value. Specifically, CenTrust's market valuation was adversely affected by the anticipated enactment of FIRREA. It was generally feared that this legislation would lead to CenTrust falling out of capital compliance and thus being subject to seizure. Subsequent events demonstrated that the market's reaction was rational as FIRREA did directly result in the Bank's seizure. CenTrust legally repurchased them from the debenture holders at discounts totaling more than $56 million. This, in turn, allowed CenTrust to increase its tangible net worth by approximately $56 million. No portion of this $56 million went to Mr. Paul personally.

Mr. Paul ultimately pled guilty to securities fraud; the district court held that such a plea necessarily included the parking allegations; and he was sentenced pursuant to section 2F1.1 of the United States Sentencing Guidelines. In making the loss calculation under section 2F1.1, the district court found that the $56 million gain to CenTrust was a $56 million loss to the investors. Accordingly, the district court determined that Mr. Paul was responsible for more than $56 million in losses under

section 2F1.1,[2] increased Mr. Paul's sentence level by 17 points, and ordered Mr. Paul to pay restitution to the investors in the amount of $56,058,000, after sentencing.

3. Procedural History

Mr. Paul was sentenced on December 1, 1994. The district court issued its sentencing order on December 6, 1994. [Appendix D] On April 28, 1995, the district court amended the judgment. On April 30, 1996, the trial court ordered Mr. Paul to forfeit his CenTrust stock and his lawsuit against the government (pending in the United States Court of Federal Claims). The trial court entered a Second Amended Judgment on Mr. Paul's sentence on May 17, 1996. On May 8 and May 22, 1996, Mr. Paul filed a Notice of Appeal from the trial court's Order of Forfeiture. The government also filed a Notice of Appeal from the forfeiture order on May 22, 1996. On September 12, 1996, the Eleventh Circuit remanded Mr. Paul's initial appeal from the trial court's sentencing order. On November 15, 1996, a third amended judgment was rendered by the District Court. [Appendix C] On November 27, 1996, Mr. Paul filed a Notice of Appeal. On December 17, 1996, the government appealed. On October 2, 1998, the Court of Appeals for the Eleventh Circuit, after hearing oral argument (and stating that the case was "well argued"), issued a per curiam opinion [Appendix A] and judgment [Appendix B] denying Mr. Paul's appeal.

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[2] The $56 million was increased by the amount of interest and fees expended by CenTrust related to the sale to and from Pharaon. These losses are not at issue in this petition.

Thereafter, on January 13, 1999, the Court of Appeals denied Petitioner's Motion for Rehearing. [Appendix E]

REASONS FOR GRANTING THE PETITION

There is currently a split in authority among the courts of appeals concerning the standard to calculate losses for purposes of determining the length of a sentence under section 2F1.1 of the Sentencing Guidelines. Several circuits have held that a defendant who sets in motion a chain of events causing losses is responsible for all results; other circuits have held that a proximate cause standard is required for sentencing. There is also a split in authority regarding the causation standards for restitution under the Victim Witness and Protection Act ("VWPA"), 18 U.S.C. § 3663(a)(1) and regarding whether the district court can delegate the decision over the scheduling of restitution payments to probation officers. As a result of this split in authority, defendants are receiving inconsistent sentences and are being ordered to pay differing amounts of restitution depending upon the particular circuit in which the defendant is tried.

This case is a paradigm fact pattern for the proximate cause standard. The defendant's alleged misconduct in arranging a parked sale of $25 million of securities (out of an issuance of $150 million) did not cause the purchasers of the other debentures to buy the debentures, and the decline in value of the securities had nothing to do with the alleged parking. Accordingly, this Court should grant certiorari to establish one uniform proximate cause standard for calculating losses for purposes of sentencing and

restitution, and to preclude the delegation of restitution payment scheduling to probation officers.

Mr. Paul was ordered to pay restitution in an amount exceeding $56 million and had seventeen points added to his sentencing calculation based on $56 million in alleged losses. In making its loss calculation, the district court failed to make any finding whether the $56 million in alleged losses was a result of Mr. Paul's conduct. The record lacked any proof of: (a) the identity of the alleged "victim" debenture purchasers,[3] (b) whether the alleged parking caused these unnamed persons to purchase the debentures, (c) the cause of the decline in the value of the debentures over a ten month period after the issuance, (d) the economic benefits that accrued to the purchasers (e.g., interest) between the time they purchased them and the time they were sold, and (e) the investors' reasons for selling their debentures to CenTrust after the market decline.

I. The Conflict Regarding Causation Standards for Deciding Sentencing Losses Under Section 2F1.1 of the United States Sentencing Guidelines

The Sentencing Commission has failed to provide any causation standards for calculating losses for purposes of sentencing under section 2F1.1 of the United States Sentencing Guidelines. As a result, the various

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[3] The list of people to whom restitution was owed was supplied by the government only *after* the sentencing hearing. Incredibly, it included an affiliate of Pharaon, the alleged co-conspirator, as a party to whom restitution was owed.

courts of appeals have been left to fashion their own standard for calculating such losses. The Circuits considering the standard to be utilized for calculating such losses have used two separate approaches: (1) a set in motion theory; and (2) a proximate cause standard. Respected academic authorities have noted the conflict. *See* R.W. Haines, Jr., et al., *Federal Sentencing Guidelines Handbook* 316, 323, 325-26 (Nov. 1998 ed.) (noting losses are a difficult problem and that the Sentencing Commission has set forth no rules for causation); Frank O. Bowman, III, *Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines* 51 VAND. L. REV. 461, 529-36 (1998) (proposes cause-in-fact and the foreseeability of economic harms standard); T. Hutchinson, et al., *Federal Sentencing Law & Practice* 397 (1998) (noting the conflict in the cases).

In *United States v. Morris*, 80 F.3d 1151 (7th Cir. 1996), the Seventh Circuit held that where the defendants concealed material facts from the bank's auditors, leading to the bank's failure to take recommended reserves, the defendants could be held accountable for the entire loss arising from the failure of the bank, even where "factors other than the failure to take recommended reserves in 1987 actually caused [the bank's] demise." *Morris*, 80 F.3d at 1171. Other causes of the losses of any type or nature whatsoever "could be accounted for only by way of a downward departure. . . . " *Id.* Downward departure motions are unreviewable. *Morris*, 80 F.3d at 1174.

The Seventh Circuit opinion relied on cases from several other circuits. *See, e.g., United States v. Brandon*, 17 F.3d 409, 459 n.83 (1st Cir. 1994), *cert. denied*, 513 U.S. 820, 115 S. Ct. 80, 81 (1994) and *United States v. Sarno*, 73 F.3d

1470, 1500-01 (9th Cir. 1995). By virtue of the instant case, the Eleventh Circuit has joined the First, Seventh, and Ninth Circuits in eschewing a traditional proximate cause analysis for determining sentencing losses.

Unlike the First, Seventh, Ninth and Eleventh Circuits, the Tenth and Fifth Circuits require a proximate causation standard, and the Third Circuit is internally divided. In *United States v. Abud-Sanchez*, 973 F.2d 835, 839 (10th Cir. 1992), a physician who committed Medicare and Medicaid fraud had his base sentencing increased by six levels because of a finding of $100,000 in losses, but the Tenth Circuit reversed because these losses were not shown to have been caused by "*criminal* activity as opposed to his *civil* violations." (emphasis in original). *See also United States v. Diamond*, 969 F.2d 961 (10th Cir. 1992).

In *United States v. Randall*, 157 F.3d 328 (5th Cir. 1998), a fraudulent bankruptcy petition delayed mortgage foreclosure proceedings, and the government agencies that insured the mortgages paid losses because of the low price received at the foreclosure sales. The court, however, held that such losses could not enhance the defendant's sentence in the absence of evidence that the delay caused a lower price or a loss of rental income.

The Third Circuit is internally divided with respect to the causation standards. In *United States v. Daddona*, 34 F.3d 163 (3d Cir. 1994), the court held that the losses must have been caused by the fraudulent activity. In *United States v. Neadle*, 72 F.3d 1104, 1110-12 (3d Cir. 1995), *amended by* 79 F.3d 14, *cert. denied*, 117 S. Ct. 238 (1996), however, the court took the opposite approach, holding

that losses caused by a hurricane could be attributed to the defendant. Judge Becker dissented.

At the sentencing hearing in this case, an FBI agent read into the record the hearsay, immunized, grand jury testimony of Lorraine Spurge of Drexel Burnham Lambert, one of the underwriters for the debenture issuance. According to the transcript of her testimony read into the record, she stated that $125 million of the debentures would have been issued absent any commitment from Pharaon, perhaps, after a short delay, and that the investors would have preferred a smaller issuance.

Relying on *Morris*, the district court concluded that but for the parking scheme between Mr. Paul and Pharaon, the investors would not have purchased the debentures "at that time," without explaining whether or how they would have avoided the market decline. Under the *Morris* theory, no inquiry need be made, and no testimony need be offered, regarding why the investors purchased the debentures; how many times the debentures were exchanged in the market place before the legal CenTrust repurchase; the amount of losses suffered by individual investors; any benefits (e.g., interest, gains on their purchase) obtained by any investors; or the reasons for the market decline of the debentures. The district court ordered Mr. Paul to pay restitution to investors who held the debentures at the time of the sentencing, whether they suffered a loss or not. Thus, an investor who purchased the debenture at the depressed price and then sold it to CenTrust at no loss would nevertheless obtain the difference between the original market price and the price at which the debenture was repurchased by CenTrust.

There was no evidence linking the parking allegations to the decline in the value of the debentures. The market for subordinated debentures declined based on the anticipated passage of the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"). CenTrust took advantage of that market decline; it bought back the debentures to extinguish its debt to the debenture holders and booked a $56 million gain on the transaction. The government's witness admitted at sentencing that he did not analyze the cause of the market decline. None of the debenture holders who sued CenTrust or Paul, testified at the sentencing hearing, or submitted victim impact letters to the court. This case is thus a paradigm for the scenario set forth in the Restatement (Second) of Torts, §§ 548A Comment B:[4]

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[4] This section reads as follows:

> Pecuniary losses that could not reasonably be expected to result from the misrepresentation are, in general, not legally caused by it and are beyond the scope of the maker's liability. This means that the matter misrepresented must be considered in the light of its tendency to cause those losses and the likelihood that they will follow. Thus one who misrepresents the financial condition of a corporation in order to sell its stock will become liable to a purchaser who relies upon the misinformation for the loss that he sustains when the facts as to the finances of the corporation become generally known and as a result the value of the shares is depreciated on the market, because that is the obviously foreseeable result of the facts misrepresented. On the other hand, there is no liability when the value of the stock goes down after the sale, not in any way because of the misrepresented financial condition, but as a result of some subsequent event that has no connection with or

> On the other hand, there is no liability when the value of the stock goes down after the sale, not in any way because of the misrepresented financial condition, but as a result of some subsequent event that has no connection with or relation to its financial condition.

Curiously, *Morris* failed to discuss 28 U.S.C. § 994(c), which provides that the Sentencing Commission, "in establishing categories of offenses for use in the guidelines . . . shall consider whether the following matters, among others, have any relevance to the nature, extent, . . . or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance . . . (3) the nature and degree of the harm *caused* by the offense. . . . " (emphasis added). The rule for civil cases requires but for and proximate causation. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S. Ct. 1311 (1992). Thus, it is difficult to understand how evidence inadequate to obtain $10 from a civil defendant could be adequate to forfeit five years of that defendant's liberty. Furthermore, every case, including *Morris*, recognizes that attributing losses to a defendant who did not cause the losses results in an unjust application of the guidelines. No reason supports prevention of this injustice as *Morris* envisions – only by way of

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> relation to its financial condition. There is, for example, no liability when the shares go down because of the sudden death of the corporation's leading officers. Although the misrepresentation has in fact caused the loss, since it has induced the purchase without which the loss would not have occurred, it is not a legal cause of the loss for which the maker is responsible. . . .

unreviewable downward departure decisions by the district courts.

Certiorari should be granted in this case. Given the discrepancy between the causation standards in the different circuits, a defendant may receive a greater or lesser sentence depending on the circuit in which his conviction occurs. There is no basis for such a distinction. The method of calculating losses for sentencing purposes, moreover, has an impact on any defendant who is convicted of fraud and sentenced pursuant to section 2F1.1 of the sentencing guidelines. Accordingly, this Petitioner respectfully requests that this Court grant certiorari to resolve the conflict among the circuits and to establish a universal causation standard for attributing losses to defendants under section 2F1.1 of the sentencing guidelines.

II. The Conflict With This Court's Decision in *Hughey v. United States* and Among the Appellate Courts Regarding Causation Standards Used to Determine Restitution Losses Under the Victim Witness and Protection Act

As with the causation standards under section 2F1.1 of the Sentencing Guidelines, there is a pronounced split among the federal circuits regarding the causation standard to be used for determining restitution under the VWPA. The VWPA states that "[t]he court, in determining whether to order restitution under this section, shall consider . . . (i) the amount of the *loss* sustained by each victim *as a result* of the offense. . . . " 18 U.S.C. § 3663(a)(1)(B) (emphasis added). In *Hughey v. United States*, 495 U.S. 411, 416 110 S. Ct. 1979 (1990), this Court

held that restitution was "intended to compensate victims only for the losses *caused* by the conduct underlying the offense of conviction." (emphasis added)

In *United States v. Vaknin*, 112 F.3d 579, 589-90 (1st Cir. 1997), the First Circuit has ruled that in restitution, "the government must show not only that a particular loss would not have occurred but for the conduct underlying the offense of conviction, but also that the causal nexus between the conduct and the loss is not too attenuated (either factually or temporally)." Thus, the First Circuit's causation analysis for restitution contradicts its causation analysis for purposes of applying section 2F1.1 of the Sentencing Guidelines. *Compare United States v. Vaknin*, 112 F.3d 579; 589-90 (1st Cir. 1997) *with United States v. Brandon*, 17 F.3d 409, 459 n.83 (1st Cir. 1994), *cert. denied*, 513 U.S. 820, 115 S. Ct. 80 (1994).

The Second and Sixth Circuits have rejected a "but for" standard and require instead a "direct result" standard. *United States v. Silkowski*, 32 F.3d 682, 689-90 (2d Cir. 1994) (VWPA limits restitution to "losses directly attributable to conduct underlying the offense of conviction"); *Ratliff v. United States*, 99 F.2d 1023, 1026-27 (6th Cir. 1993) ("any loss for which restitution is ordered must result directly from the defendant's offense").

Contrary to the Second and Sixth Circuits, the Tenth Circuit has embraced a "but for" standard and has rejected the necessity of proving causation. *United States v. Richard*, 738 F.2d 1120, 1122-23 (10th Cir. 1994) ("the government need not prove that the defendant was directly responsible for the loss"). The Ninth Circuit, along with the Third Circuit, appears confused as to the

appropriate causation standard to be applied. *See Gov't of the Virgin Islands v. Davis*, 43 F.3d 41, 46 (3d Cir. 1994) (endorsing cases that used the "direct result" causation and those that use "but for" causation in the same paragraph); *United States v. Cloud*, 872 F.2d 846, 856 n.13 (9th Cir. 1989) (noting that there "appears to be a conflict in this circuit regarding the nexus the government must establish between the defendant's criminal conduct and the victim's losses").

Here, the same losses were used to compute the sentence under the Sentencing Guidelines and the order of restitution under the VWPA. Accordingly, the causation standards should be the same. In the instant case, the district court applied the same standards for determining restitution and sentencing, but it failed to use a proximate cause standard.

The VWPA, along with *Hughey* and *Vaknin*, mandate a proximate cause standard. Whether the proximate causation standard or the "but for" standard should be used is of importance in every restitution case. The proximate causation standard is long established, fairly attributes the consequences of misconduct to a defendant, and avoids restitution orders that impose out-of-proportion penalties. Therefore, this Court should grant certiorari to resolve the conflict amongst the circuits and to adopt the proximate cause standard as the proper method of calculating losses for purposes of determining sentencing and restitution.

III. The Inter-Circuit Conflict as to Whether Restitution Payment Schedules can be Delegated to a Probation Officer

In *United States v. Mohammed*, 53 F.3d 1426, 1438 (7th Cir. 1995), the court reviewed a sentencing order that provided for the payment of $3.2 million in restitution "[i]n a manner to be determined by the probation officer." The court, *sua sponte*, held that this was improper: "a court abdicates its judicial responsibility when it authorizes a probation officer to determine the manner of restitution." (citations omitted). The delegation of payment schedules violates both the VWPA (18 U.S.C. § 3663(f)(1)) and Article III of the United States Constitution. Most other circuits agree. *See United States v. Albro*, 32 F.3d 173, 174 n.1 (5th Cir. 1994) (per curiam); *United States v. Johnson*, 48 F.3d 806, 808-09 (4th Cir. 1995); *United States v. Porter*, 41 F.3d 68, 71 (2d Cir. 1994).

The Ninth and Eleventh Circuits disagree with the foregoing holdings. *See United States v. Barany*, 884 F.2d 1255, 1260 (9th Cir. 1989), *cert. denied*, 493 U.S. 1034 (1990); *United States v. Stinson*, 97 F.3d 466, 468 n.1 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 1007 (1997). In *United States v. Fuentes*, 107 F.3d 1515, 1528-29 n.25 (11th Cir. 1997), *Stinson* was questioned, but not overruled.

Here, the trial court ordered that:

> Restitution shall be paid in such installments, at such times and in such a manner as shall be directed by the Bureau of Prisons, during his term of incarceration and by the Probation Officer of this Court, following the defendant's release for [sic] imprisonment [Appendix C at p. 14].

This order was improper in the Second, Fourth, Fifth, and Seventh Circuits, but proper in the Eleventh and Ninth Circuits. Notwithstanding that *Fuentes* questioned *Stinson*, both *Fuentes* and the instant case applied *Stinson*, and refused to reverse the district courts' delegation of restitution payment schedules to probation officers. With over $56 million of restitution payments owed in this case, an enormous amount of discretion was vested in a probation officer. The conflict is therefore ripe for review by this court and squarely presented by this case.

CONCLUSION

The causation standards for sentencing guideline losses and restitution should be the same, especially in this case, where the restitution ordered and the sentencing losses found were the same. The decision between a proximate cause approach or the "set in motion" approach is a significant issue that affects thousands of sentencing decisions – both for losses and restitution. The proximate cause standard is established, fair and just.

The Sentencing Commission has no causation standard for determining losses, and the circuits are divided on this issue. Imposing a uniform standard would eliminate disparate sentences that depend solely on the circuit of the crime; would make it easier for the circuit and district courts to reach sentencing decisions, and would eliminate significant litigation over these standards that now occurs.

The district court delegated to the probation officer the right to schedule over $56 million in restitution payments in this case, contrary to decisions in the Second,

Fourth, Fifth and Seventh Circuits, but in accordance with decisions in the Ninth and Eleventh Circuits. This delegation is improper under the VWPA and Article III of the Constitution.

WHEREFORE, for the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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PETITIONER'S APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-5502

D.C. Docket No. 92-134-CR-GRAHAM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appellant,

versus

DAVID L. PAUL,

Defendant-Appellant.
Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

(October 2, 1998)

Before ANDERSON and BARKETT, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

After oral argument and careful consideration, we reject as without merit defendant's arguments challenging his sentence; therefore, we affirm the sentence. We also affirm the district court's judgment of forfeiture with

respect to defendant's CenTrust stock. Furthermore, we see no error in the district court's finding that the defendant's interest in the breach of contract cause of action should be forfeited.[1] However, the district court should have valued the cause of action as of the time of forfeiture and then should have proceeded to conduct the appropriate analysis under the Excessive Fines Clause.

The case is remanded with directions for the district court to value the cause of action, conduct the Excessive Fines analysis, and reach a determination as to forfeiture of all or part of the cause of action.

AFFIRMED IN PART AND REMANDED.

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[1] The action is entitled *Anderson, et al. v. United States*, 91-34-CIV-SMITH, and is currently pending in the United States Court of Federal Claims.

APPENDIX B

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 96-5502

District Court Docket No. 92-134-CR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appellant,

versus

DAVID L. PAUL,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

Before ANDERSON and BARKETT, Circuit Judges, and HILL, Senior Circuit Judge.

JUDGMENT

(Filed Oct 02 1998)

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the sentence imposed by the said District Court and judgment of forfeiture with respect to defendant's CenTrust stock in these causes be and the same are hereby AFFIRMED; and that portion of the judgment as to the value of the cause of action is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court.

Entered: October 2, 1998
For the Court: Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: FEB 05 1998

APPENDIX C

UNITED STATES DISTRICT COURT
Southern District of Florida

UNITED STATES OF AMERICA

v.

DAVID L. PAUL,
Reg. No. 37935-004
Defendant.

Case Number:
92-134-CR-GRAHAM(01)(s)
Steve Petri,
Assistant U. S. Attorney
Allan J. Sullivan
Assistant U. S. Attorney

THIRD AMENDED
JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Nov. 15, 1996)

The defendant, DAVID L. PAUL, was represented by Thomas Allen 225 W. Wacker Drive Chicago, IL 60606-1229, Stephen C. Neal 300 S. Grand Avenue Los Angeles, CA 90071 and Benson Weintraub 407 Lincoln Road 11th Floor Miami Beach, Florida 33139.

On August 14, 1996, an Order from the United States Eleventh Circuit Court of Appeals issued, remanding this cause "to the district court for entry of a proper order of forfeiture and for resentencing." Thereafter, the district court requested the parties to set forth their positions as to whether or not defendant David Paul was required to be present at a resentencing hearing. The Court has considered the pleadings filed by the parties, including the Government's position regarding Defendant's presence at

resentencing (DE 846) and Defendant's position regarding Defendant's Presence at resentencing (DE 856). In addition, the Court has considered the prior record of this matter, including the extensive proceedings and hearings conducted on the sentencing issues. The Court also notes that defendant was present for all prior hearings and was present on April 30, 1996, when the Order of Forfeiture was imposed. Subsequently, the Order of Forfeiture was incorporated into the Second Amended Judgment and Commitment Order. In light of the above, the Court hereby enters this Third Amended Judgment and Commitment Order which imposes the exact sentence on defendant as the Second Amended Judgment and Commitment Order entered May 17, 1996, without regarding the presence of defendant David L. Paul.

On motion of the United States the court has dismissed count(s) 93 and 94 of the Indictment. The defendant has been found not guilty on count(s) 39 of the Indictment and is discharged as to such count(s).

The defendant pleaded guilty to count(s) 1 through 28 and Count 100 of the Superseding Indictment. The defendant was found guilty on count(s) 29 through 38, 40 through 93 and 95 through 99 of the Superseding indictment after a plea of not guilty.

As pronounced on April 29, 1996, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $4,850.00, for count(s) 1 through 38, 40-92, 95-99 and 100 of the superseding Indictment, which shall be due immediately.

Signed this the 14th day of November, 1996.

/s/ Donald L. Graham
DONALD L. GRAHAM
UNITED STATES
DISTRICT JUDGE

Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1962 (c)(d)	Engaging in Racketeering Enterprise	2/2/90	1,100
18 U.S.C. § 371	Conspiracy to Defraud the United States	–	2 & 29
18 U.S.C. § 1343	Wire Fraud	7/89	3-6, 10
18 U.S.C. § 134	Bank Fraud 7/31/89	7, 8, 30-33, 35-38, 42-45, 47-53, 55-58, 60-63, 70-73, 80-83, and 85-88	
18 U.S.C. § 657	Misapplication of Funds Belonging to a Financial Institution 7/27/88	9, 34, 40, 46, 54, 59 69, 74, 79, & 90	
18 U.S.C. § 1006	False Entries on Books & Records of a Financial Institution 5/89	12, 15-28 & 41	
18 U.S.C. § 1341	Mail Fraud 6/15/88	11, 64, 84, & 89	
18 U.S.C. § 1505	Obstruction of Justice 1/10/91	91, 92	
15 U.S.C. § 77(q)(a)	Securities Fraud 1/89	13, 14	
26 U.S.C. § 7206(1)	Filing & False Tax Return 9/27/90	95-99	

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's SSAN: 160-32-8403
Defendant's Date of Birth: 5/1/39
Defendant's address: David Paul, FMC Rochester
Post Office Box 4600
Rochester, Minnesota 55903-4600

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of (132) months as to Counts 1, and 100, 60 months as to each of Counts 2 through 38 and 40-92, and 36 months as to each of counts 95 through 99, all to be served concurrently.

The Court makes the following recommendations to the Bureau of Prisons: That the defendant is designated to a facility close to his home of record, if found eligible by the Bureau of Prisons

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) years as to Counts 1 through 38, 40 through 92, 100 and one year on each of Counts 95 through 99, all such terms to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own or possess a firearm or destructive device.

4. As a special conditions of Supervised Release the defendant shall pay a fine and restitution.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

As to each of Counts 1-38, 40-92, 95-99 and Count 100, the defendant shall pay to the United States a fine of $5,000,000.00. These fine are imposed currently so that the total fine is $5,000,000.00.

This fine includes any costs of incarceration and supervision.

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

This fine shall be paid to the Clerk, United States District Court in such installments, at such times and in such a manner as shall be directed by the Bureau of Prisons, during term of incarceration and by the Probation Officer following defendant's release.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution

Department of Justice, (Attorney General)
Debt Collection Unit
99 N. E. 4th Street
Miami, Florida 33132

Payments of restitution in the amount of $56,058,000 to the public and institutional investors, as per the restitution list (Restitution List attached to original Judgment Order).

Restitution in the amount of $1,025,000 and $2,997,871.19 to Resolution Trust Corporation ("RTC").

Restitution shall be paid in such installments, at such times and in such a manner as shall be directed by the Bureau of Prisons, during his term of incarceration and by the Probation Officer of this Court, following the defendant's release for imprisonment.

If there are multiple payees, any payment not made directly to a payee shall be divided proportionately among the payees named unless otherwise specified here: **See attached victim list.**

FORFEITURE

The defendant is ordered to forfeit the following property to the United States:

1. Any and all interest of the defendant, relating back to the commencement of the racketeering offense, on or about July 1984, in any stock of, or other equity interest in, the enterprise, CenTrust Bank and its subsidiaries, including but not limited to 1,895,540 shares of Centrust Bank Common Stock, and 1,895,540 shares of Centrust Bank Series 1 participating Stock;

2. Any and all purported rights of the defendant in Count 1 of the cause of action entitled *Anderson, et. al. v. United States,* 91-34-CIV-SMITH (Court of Claims), but only to the extent that forfeiture of these rights does not

conflict with the Excessive Fines Clause of Eighth Amendment of the United States Constitution; and

3. Any and all purported rights of the defendant in Count II of the cause of action entitled *Anderson, et. al. v. United States*, 91-34-CIV-SMITH (Court of Claims), due to the above mentioned forfeiture of the CentTrust stock.

It is Further Ordered and Adjudged that the defendant may proceed to litigate Count 1 of his *Anderson* claim before the United States Federal Claims Court at his peril. However, any recovery obtained by defendant from Count 1 of the *Anderson* claim will be forfeited to the United States unless it constitutes an Excessive Fine in violation of the Eighth Amendment of the United States Constitution.

It is Further Ordered and Adjudged that this Court retains jurisdiction to determine whether or not forfeiture of any future recovery awarded to defendant pursuant to Count 1 of the *Anderson* case constitutes an Excessive Fine pursuant to the Eighth Amendment of the United States Constitution.

FINE

The defendant shall pay a fine of $5,000,000.00. This fine includes any costs of incarceration and supervision.

This amount is the total of the fines imposed on individual counts, as follows: $5,000,000.00 as to Counts 1-38, 40-92, 95-99 and Count 100, Concurrent.

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

This fine shall be paid to the Clerk, United States District Court in such installments, at such times and in such a manner as shall be directed by the Bureau of Prisons, during term of incarceration and by the Probation Officer following defendant's release.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

APPENDIX D

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO. 92-134-CR-GRAHAM

UNITED STATES OF AMERICA
Plaintiff,

vs.

DAVID L. PAUL,
Defendant.

_____/

ORDER

(Filed 12/6/94)

THIS MATTER came before the Court to determine an appropriate sentence pursuant to the Sentencing Reform Act of 1984 and the implementing United States Sentencing Commission Guidelines (USSG)

This Court was presented with in excess of 10,000 pages of documentation (transcripts, pleadings, exhibits, etc.) to consider in determining an appropriate sentence. In order to facilitate the fact finding process, the parties agreed that the Court would make proposed findings rather than relying on the original PSI (paragraphs 19 through 51) and objections thereto. The primary contested issues included the dollars loss to be attributed to the Defendant for purposes of determining the offense level in accordance with the United States Sentencing Commission Guidelines ("USSG").

In a three-day sentencing hearing the Court allowed the parties to present evidence and argument with respect to the dollar amount that should be attributed to the Defendant.

Based upon the aforementioned hearing, and the record in this cause, the Court *proposes* the following as findings of fact. The findings were determined using the standard, "Preponderance of The Evidence".

As to the counts the Defendant entered a plea of guilty to (Counts 1 through 28 and Count 100 of the indictment), the Court, of course, considered the content of the superseding indictment. [See *U.S. v. Taffe* decided October 27, 1994 by the 11th Circuit which holds that a plea of guilty to a count results in a legally binding admission of responsibility. Moreover, the Supreme Court has held that "[a] plea of guilty and the ensuring conviction comprehend all of the factual and legal elements necessary to sustain a finding, final judgment of guilty and lawful sentence." *United States v. Broce*, 488 U.S. 563 (1989).] With respect to the loss amount of the offense conduct related to the BCCI "Parking Transaction and the Fraud Relating to the Junk Bond Acquisition Practices", the Court relied on the testimony and exhibits presented and received during the three-day sentencing hearing conducted on November 17, 18 and 21, 1994. Also given great weight was the plea colloquy, the "Agreed Statement of the Legal Elements of the Offenses in Counts 1 through 28 and Count 100 of the Superseding Indictment" and "Defendant David Paul's Factual Basis for Change of Plea". Moreover, the Court relied upon the testimony presented at the trial of Defendant Paul and Defendant Berry, and the record in general.

OFFENSE CONDUCT

1. Paul was Chairman of the Board of Directors of CenTrust Bank ("CenTrust"), a state-chartered savings and loan institution. Paul was a principal shareholder of CenTrust at times owning in excess of 50 percent of the bank's stock. Paul also was an officer of the bank, having served as its Chief Executive Officer.

2. CenTrust maintained its principal offices in Miami, Florida. The Bank owned, operated and controlled numerous subsidiary corporations, including CenTrust Realty and Construction Company, CenTrust Trust and Old American Insurance Company. The latter two entities had offices in Connecticut and Missouri, respectively.

3. Centrust's deposits were insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"), an agency of the United States. The Bank was regulated and supervised by the Federal Home Loan Bank Board ("FHLBB"), also an agency of the United States, at least until 1989 when the Office of Thrift Supervision ("OTS") and the Federal Deposit Insurance Corporation ("FDIC") assumed, respectively, the regulatory and insurance functions of the FHLBB and the FSLIC.

4. CenTrust was, at all times during Paul's control of the institution, subject to heightened regulatory scrutiny and supervision by the FHLBB and OTS due to concerns by the FHLBB and OTS as to CenTrust's financial condition and operations. Starting as early as 1984, FHLBB officials responsible for the supervision and regulation of CenTrust stated and reiterated numerous concerns over the banking operations of CenTrust. In written

examination reports and correspondence, as well as in meetings with Paul and with Centrust's Board of Directors and management, FHLBB officials focused on, among other things, CenTrust's operating results (including its history of substantial operating losses); its high level of investments in risky, high-yield debt securities, also known as "junk bonds", the Bank's expenditures, including the amounts CenTrust spent on compensation for Paul and other executives; and deficiencies in CenTrust's "underwriting" (or credit analysis) practices with respect to its acquisitions of junk bonds. On occasion, many of the problems intermediate Government officials had with Paul's proposals and requests were overruled by Senior Government Officials, thereby concurring with Paul's position.

5. CenTrust first sought regulatory approval for an issuance of $200,000,000 in subordinated debentures in late 1986. As originally contemplated, CenTrust, through a "public offering" of these bonds, would borrow from public and institutional investors up to $200 million. Depending upon the success of the marketing efforts by the "underwriters" of the debt offering [Drexel Burnham Lambert ("Drexel Burnham") and Merrill Lynch], the underwriters could exercise what is referred to as a "green shoe" provision if necessary to meet excess demand for the bonds by issuing an additional $25,000,000 of the subordinated debentures.

6. Although the bonds were a form of borrowing, or a liability, CenTrust asked federal regulators for permission to include the proceeds of the issuance as a form of "regulatory capital." The consequence of the FHLBB's approval of the offering as a form of capital would be at

lest two-fold. First, CenTrust could use the amount of the debt to satisfy regulatory capital ratios. The ratio of assets or liabilities to the total "regulatory capital" was an important test of the financial health of a financial institution. Second, by increasing its regulatory capital CenTrust could fuel future growth by using the capital as a base to acquire substantial additional deposits. At the time, every additional dollar of regulatory capital could form the basis for an additional $16 of deposit growth. The net effect of the addition of $200 million in regulatory capital would be to give CenTrust the ability to grow its deposit base well in excess of $3 billion, which deposits FSLIC would likely be required to insure.

7. Federal regulators initially denied CenTrust's application. In December 1987, federal regulators in Atlanta agreed to recommend approval of the debt offering, but only after Paul advised that the funds acquired through the public offering would be used to retire certain high cost preferred stock the bank had issued.

8. Thereafter, CenTrust, in April 1988, made arrangements to proceed to market the bonds that were to be offered. Preliminary marketing efforts included holding "road shows," attended by representatives of Drexel Burnham and Merrill Lynch and members of CenTrust management, designed to generate interest in the public offering among prospective purchasers. Representatives of Merrill Lynch and Drexel Burnham also solicited "indications of interest" from prospective institutional buyers.

9. The initial result of these sales efforts were disappointing. Paul was in frequent, often daily, contact with

the sales staff of at least Drexel Burnham. Paul was advised in his communications with Drexel Burnham sales personnel that the pre-offering sales efforts had been poor and that additional buyers would be necessary.

10. Ultimately, on or about May 16, 1988, over the objections of the FHLBB accounting and legal staff, the three-member FHLBB Board agreed to allow the offering to go to market without modification of CenTrust's financial statements.

11. Again, the pre-issuance marketing efforts had in fact gone poorly. The underwriters had found potential buyers for less than $100 million of the contemplated issuance. Paul decided to downsize the issuance to $150 million.

12. As a result, Paul again contacted minority shareholder Ghaith, Pharaon in France and asked if Pharaon could arrange a short-term, risk-free purchase of $25 million of the issuance in order to induce the underwriters to proceed to market. Paul agreed that the Bank would repurchase the debt within months at no loss to the purchaser. Pharaon, who had significant ties to the Bank of Credit and Commerce International ("BCCI"), agreed to arrange BCCI's temporary acquisition of $25 million of the bonds. Paul communicated to Drexel that he had found a buyer for an additional $25 million and urged that the issuance go to market. Drexel Burnham and Merrill Lynch agreed to do so. Without the last minute infusion of this additional $25 million commitment, Drexel Burnham and Merrill Lynch would not at

that time have gone to market on the $150 million offering.

13. The net effect of the additional $25 million purchase was to permit an offering at a $150 million level, which helped to conceal from the FHLBB and investors. Paul and Pharaon's misrepresentations about the level of investor interest designed materially to affect the internal deliberations within the FHLBB about the accounting issue.

14. As had been arranged, within six to eight weeks Pharaon and Paul sought to have Paul re-acquire the $25 million in bonds that BCCI had purchased through its Paris offices. Paul directed CenTrust's treasurer to wire transfer funds to BCCI-Paris to acquire the bonds. Paul directed further that the purchase be made in the name of a Connecticut real estate subsidiary, CenTrust Trust. Although Paul caused CenTrust to pay BCCI the face value of the bonds ($25 million), that amount exceeded by $331,000 the amount BCCI had paid for the bonds (BCCI had paid a "discounted" price of $24,669,000). BCCI transferred the $331,000 to Pharaon as his profit on the transaction. For its part, BCCI received from CenTrust $694,000 in interest for buying the debt, essentially as a risk-free investment.

15. Several efforts were thereafter undertaken to conceal the true nature of the transaction with BCCI:

(1) In financial reports submitted to the FHLBB, CenTrust did not report the repurchase of the debt from BCCI, at least in part due to Paul's direction;

(2) Paul executed a financial report wherein he falsely represented that the buy-back from BCCI had been effected on the "open market;"

(3) When the Bank's auditors questioned Paul about the buy-back of the $25 million in bonds, Paul represented, falsely, that he had agreed with the FHLBB that, although the face amount of the bonds offering was $150,000,000, the offering was truly only ever intended to be $125,000,000;

(4) When FHLBB examiners later questioned CenTrust about the buy-back, Paul falsely suggested that Pharaon's involvement in the transaction was one of a disinterested broker and that Pharaon had received no compensation for the deal.

16. Ultimately, the investors who had acquired the CenTrust subordinated debentures suffered substantial losses. Within seven months following the issuance of the bonds, CenTrust began a "buy-back" program, which resulted in CenTrust retiring the debt at a substantial discount until regulators ordered CenTrust to halt the repurchases. Investors who sold the bonds back to CenTrust often realized less than $.50 on their initial dollar investment. Total losses to investors was $56,058,000. Accordingly, the total loss attributed to Paul is $56,058,000, plus $694,000, plus $331,000 for a total of $57,083,000.

The Court further finds:

17. In May 1988, as one of its thirty-two public or private placement offerings, CenTrust Savings Bank

("CenTrust"), a federally insured financial institution, issued $150,000,000 of subordinated debentures.

18. As part of CenTrust's efforts to obtain regulatory approval for this offering, Paul and others willfully represented to officials of the Washington FHLBB that, based on the preliminary marketing efforts in April of 1988, CenTrust, through its underwriters, had received indications that up to $230,000,000 of the subordinated debentures could be sold.

19. Paul knew at that time, however, that there was no indication that specific prospective institutional investors were prepared to purchase up to $230 million.

20. In connection with this same offering, Paul and others entered an agreement to have the Bank of Credit and Commerce International ("BCCI") purchase $25 million of subordinated debentures. Paul agreed with Pharoan that CenTrust would repurchase the $25 million of subordinated debentures from BCCI at a later time.

21. Paul and other [sic] knowingly and fraudulently failed to disclose to CenTrust's external auditors the fact surrounding the repurchase of the subordinated debentures from BCCI.

22. As part of this scheme, Paul caused the wire communications charged in Counts 3 through 6 of the indictment and in furtherance of his efforts to defraud.

23. As another part of this scheme, the transfer of funds charged in Count 7 of the indictment and CenTrust's response to the FHLBB examination charged in Count 8 of the indictment were caused by Paul and were in furtherance of his efforts to defraud.

24. The misapplication charged in Count 9 also was caused by Paul and Pharoan.

25. On or about June 13, 1988, Paul and others caused CenTrust to sell American Continental Corporation ("ACC") 2,735,000 shares of Playtex common stock at $9.00 per share. Paul and others caused CenTrust to agree to purchase for $30 million a "Profit Participation" in the Grant Union Acquisition Corporation ("GUAC") from ACC.

26. Paul and others knowingly and intentionally concealed that the sale of Playtex common stock and purchase of the GUAC Profit Participation were linked and not independent transaction.

27. As part of the fraudulent concealment of the true nature of this transaction, Paul caused others to send the wire communication charged in Count 10 and caused the use of the United States mails charged in Count 11 of the indictment. Each of those acts was taken with the intent to defraud.

28. In addition, and as further part of the fraud, Paul and others knowingly caused the false entry charged in Count 12 of the indictment to be made in the records of CenTrust. This entry was known by Paul to be false.

29. In May of 1988, CenTrust issued and Merrill Lynch & Drexel Burnham underwrote and purchased a 150 million dollar debenture offering. In August of 1989, CenTrust received permission from the FHLBB to sell without underwriters no more than 50 million dollars of Capital Notes within its branches.

30. The FHLBB required, as a condition of approval of the 50 million dollar Capital Note offering, that CenTrust retire the exact amount of subordinated debentures as the Notes were sold. Therefore, for every dollar of Capital Notes sold in the CenTrust branches, CenTrust was required to retire the exact amount of subordinated debentures before the Notes were sold.

31. In offering these investments, Paul and others intentionally omitted from both of the offering circular documents material facts that fully delineated the process of underwriting used by CenTrust in making its initial decision to purchase "investments".

32. As part of its business practices, CenTrust purchased, at various times, non-investment grade high-yield securities, private placement securities and/or commercial loans with bond characteristics hereinafter referred to as "investments." In making CenTrust's "investments" purchase decisions, Paul reviewed the offering materials of the issuer.

33. After the purchase decision by Paul of certain "investments", Paul caused CenTrust employees to add various documents and analyses to CenTrust's investment files. These "documents", known as "Loan Request Sheet/Credit Committee", "Financial Analysis" and "Loan Request Sheet", were designed to create the false and deceptive impression for FHLBB and OTS examiners that "documents" had been completed by CenTrust prior to the purchase of those "investments" specifically identified in Counts 15 through 28.

34. Paul and others caused the creation of the documents listed in Counts 15 through 28 of the indictment

and knowingly caused these false entries to be placed in the CenTrust records of the "investment" files in the manner described above. The false entries were willfully caused to be made by Paul and others with the intention of misleading federal regulators.

35. The subordinated debenture offering, Playtex/GUAC securities transaction, and fraudulent underwriting practices were the result of an agreement knowingly entered between Paul and others for the purpose of committing these offenses. The acts described above in the subordinated debenture, Playtex/Memorex securities transaction, and underwriting practices sections were taken in an effort to accomplish the object of the conspiracy.

36. Paul was employed by CenTrust. CenTrust and its subsidiaries constituted an "enterprise" within the meaning of 18 U.S.C. §1961. Both the normal business and racketeering activities of CenTrust affected interstate commerce.

37. Racketeering Acts 3(a) and 3(b) of the indictment allege as predicate acts the substantive violations charged in Counts 10 and 11 regarding the Playtex/GUAC transaction.

38. As stated previously, those acts were connected as part of a common scheme. And, Paul knowingly and willfully participated in the commission of those acts.

39. As an employee of CenTrust, Paul and others knowingly agreed to participate in the affairs of CenTrust, in part, through a pattern of racketeering. In joining that conspiracy, Paul intended to participate in the

commission of the two acts of racketeering charged as predicate acts 3(a) and 3(b) of the indictment regarding the Playtex/Memorex transactions.

40. The Court also makes the following additional findings of fact and incorporates by reference Defendants' Agreed Statement of the Legal Elements of the Offenses in Counts 1 through 28 and Count 100 of the Superseding Indictment, specifically paragraphs 1 through 9. (See Attachment I)

41. This Court listened to a great deal of testimony related to the high yield junk bond acquisitions including the testimony of various "expert" witnesses. The Court does not find by a preponderance of the evidence that the loss, if any in the junk bond portfolio should be attributed to David Paul. The complicated formulas and accounting methods presented by the parties have not persuaded the Court that the junk bond portfolio losses "for guideline" purposes should be attributed to the Defendant.

42. The parties stipulated that the loss for misapplication of CenTrust funds was $3,188,445.91. The Court concurs with the stipulation based upon testimony and exhibits received at trial and the record in general.

43. The parties stipulated that there was no dollar loss with respect to the Playtex/GUAC Swap transaction. Accordingly, no dollar loss will be attributed to Defendant Paul for this transaction.

44. The parties stipulated that the dollar loss with respect to the Income Tax Violation is $639,403.93. The Court concurs with the stipulation and accepts same.

DONE AND ORDERED in Miami, Florida this 6th day of December 1994.

/s/ Donald L. Graham
DONALD L. GRAHAM
U. S. District Judge

cc: Counsel of Record

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-5502

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appellant,

versus

DAVID L. PAUL,

Defendant-Appellant,
Cross-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___F.2d___).

(Filed Jan. 13, 1999)

Before: ANDERSON and BARKETT, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-5502

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appellant,

versus

DAVID L. PAUL,

Defendant-Appellant,
Cross-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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(Filed Jan. 13, 1999)

Before: ANDERSON and BARKETT, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant Paul is denied.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

APPENDIX F

SENTINCING GUIDELINES
PART F – OFFENSES INVOLVING FRAUD OR DECEIT

§ 2F1.1. Fraud and Deceit

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(A) $2,000 or less	no increase
(B) More than $2,000	add 1
(C) More than $5,000	add 2
(D) More than $10,000	add 3
(E) More than $20,000	add 4
(F) More than $40,000	add 5
(G) More than $70,000	add 6
(H) More than $120,000	add 7
(I) More than $200,000	add 8
(J) More than $350,000	add 9
(K) More than $500,000	add 10
(L) More than $800,000	add 11
(M) More than $1,500,000	add 12
(N) More than $2,500,000	add 13
(O) More than $5,000,000	add 14
(P) More than $10,000,000	add 15

(Q)	More than $20,000,000	add 16
(R)	More than $40,000,000	add 17
(S)	More than $80,000,000	add 18

(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.

(3) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree or process, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(4) If the offense involved the conscious or reckless risk of serious bodily injury, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

(5) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.

(6) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

APPENDIX G

18 U.S.C. § 3663. Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i)(j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense.

(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.

(b) The order may require that such defendant –

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of –

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim –

(A) pay an amount equal to the cost of necessary medical and related professional services

and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c) If the court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process.

(e)(1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that

such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in –

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than –

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(4) The order of restitution shall require the defendant to make restitution directly to the victim or other person eligible under this section, or to deliver the amount or property due as restitution to the Attorney General for transfer to such victim or person.

(g) If such defendant is placed on probation or sentenced to a term of supervised release under this title, any restitution ordered under this section shall be a condition of such probation or supervised release. The court may revoke probation, or modify the term or conditions of a term of supervised release, or hold a defendant in contempt pursuant to section 3583(e) if the defendant fails to comply with such order. In determining whether to revoke probation, modify the term or conditions of supervised release, or hold a defendant serving a term of supervised release in contempt, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) an order of restitution may be enforced by the United States in the manner provided in sections 3812 and 3813 or in the same manner as a judgment in a civil action, and by the victim named in the order to receive the restitution in the same manner as a judgment in a civil action.